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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

MARSHALL SCOTT MINNICH,

Defendant and Appellant.

F077819

(Super. Ct. No. 1495998)

OPINION

APPEAL from a judgment of the Superior Court of Stanislaus County. Dawna Reeves, Judge.

Patrick J. Hennessey, Jr., under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez, Lewis A. Martinez, and Sarah J. Jacobs, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

A jury convicted Marshall Scott Minnich of two counts of second degree burglary (Pen. Code, § 459;¹ counts I & IV) and one count of robbery (§ 211; count II).² In count II (robbery), the trial court sentenced Minnich to prison for three years, which was doubled because of a prior strike conviction. In count IV (burglary), the court imposed a consecutive term of one year four months. A five-year enhancement under section 667, subdivision (a), was imposed for a prior serious felony conviction. The sentence on the other burglary conviction was stayed. Minnich received an aggregate prison term of 12 years four months.

Minnich asserts his robbery conviction must be reversed due to insufficient evidence. We reject that claim. We agree with the parties, however, that resentencing is required following Senate Bill No. 1393 (2017-2018 Reg. Sess.) (Senate Bill 1393). The trial court shall exercise its discretion to dismiss or strike the five-year enhancement imposed under section 667, subdivision (a). We remand for resentencing but otherwise affirm.

BACKGROUND

These crimes took place at two separate locations. The first burglary and the robbery occurred at a church. The second burglary took place about 16 days later at a computer repair store. Minnich committed these crimes with codefendant Steven Laverne Anderson. Anderson and Minnich were tried together.³

¹ All future statutory references are to the Penal Code unless otherwise noted.

² In count III, the jury found Minnich not guilty of assault with a stun gun or taser (§ 244.5, subd. (b)).

³ In companion case, *People v. Anderson*, No. F078845, we address the various claims which Anderson has raised.

I. November 1, 2015 Burglary and Robbery at the Church

In the early morning hours on November 1, 2015, the pastor at a church in Modesto received a notification on his cell phone that the church's alarm had activated. The pastor grabbed a golf putter for protection and he drove to the church, which was less than five minutes from his residence.⁴ When the pastor arrived, he saw three suspects wearing masks. The suspects were in one of the church's breezeways. They were on bicycles, and one of the bikes had an attached trailer. The pastor could see items in the trailer, such as computer equipment, which he believed had been taken from the church.

The pastor, a former marine, exited his vehicle and he ran towards the suspects. The suspects began to flee but two of them collided on their bikes, and they fell down. The pastor was able to reach one of the suspects, whom he pushed against a wall.

According to the pastor's trial testimony, once he had pinned the suspect against the wall, this person said, "Let's fuck this guy up." The pastor realized he was outnumbered and in trouble. He feared for his safety. He hit this suspect over his head with the putter. The blow struck the back of the suspect's head, and the suspect fell down. He tried to get back up, and the pastor told him to stay down.⁵

The other two suspects came towards the pastor. One of them sprayed something onto the pastor's face and said, "I maced him. I maced him." The substance was in the pastor's eyes, but it was not yet overpowering his ability to see.⁶ The pastor took a step

⁴ At trial, the pastor explained that, several weeks prior to this break-in, the church had been burglarized. A computer and safe had been taken. After learning about "a rash of break-ins at other places[.]" the pastor changed the alarm notification system so he would be alerted when the alarm activated. The pastor admitted during trial that he was angry upon learning the church's alarm had activated. He did not want thieves to believe the church was a "soft target[.]"

⁵ At trial, a detective testified that, when he interviewed the pastor, the pastor had said this suspect told the others to "fuck this guy up" *after* the pastor struck him with the putter.

⁶ The pastor testified that the substance sprayed onto his face began to burn his eyes. Once the suspects fled, the pastor had to flush his eyes with water.

towards the second suspect, who ran from him. The third suspect pulled out a stun gun and advanced towards the pastor.⁷ The pastor heard and saw a spark originate from the stun gun. Using his putter, the pastor struck the third suspect's wrist. The blow knocked the stun gun from the suspect's hand. This suspect moved away from the pastor. According to the pastor, the first suspect got up. The pastor testified that he told the suspects to go and leave their stuff. He said, "I stood my ground and they turned and they left."⁸

The suspects left behind two bicycles, the trailer, some tools, and certain items taken from the church, such as computer equipment. A Spiderman mask was discovered on the ground.⁹

The pastor called his wife to report what had happened, and he asked her to contact the police. An officer arrived at the church at about 4:41 a.m.

Surveillance video at the church recorded parts of this incident. Still photographs taken from that video were moved into evidence. One photo showed the three suspects, and they all had covered their faces with different masks. One suspect wore a "Hannibal Lecter" mask.

At trial, the pastor admitted that, during his initial interview with an officer, he had not disclosed using a putter to strike one of the suspects on his head. The pastor,

⁷ At trial, this device was alternatively referred to as a taser, a shock weapon, and a stun gun. A detective, however, clarified for the jury that this was a stun gun.

⁸ At times, the pastor's testimony was vague regarding the timing of events. At one point his testimony suggests that, after the pastor knocked the stun gun away, the three suspects ran away but they returned as a group shortly thereafter. The pastor, who was still holding the putter, stood his ground. He told them, "Get out of here. Leave your stuff and leave. Just leave." The suspects left.

⁹ At trial, a responding officer informed the jury that the pastor had reported pulling this mask off one of the suspect's heads. At trial, the pastor could not recall if he or the suspect had pulled off the mask.

however, later told a detective about the putter. The pastor admitted that he was having trouble remembering details from the incident, and his recollections differed over time.¹⁰

The pastor testified that, after the suspects fled, he went through the church offices to see if anything else was missing. The pastor determined an external hard drive and a classic iPod were still missing. He told the jury that one or two other items, such as a thumb drive, could also be missing, but he was not sure without reviewing the insurance report.

II. Computer Repair Store Burglary

About 16 days after the church incident, Anderson and Minnich were arrested. Their arrests occurred after police responded to a reported burglary in progress at a computer repair store located in Modesto. Both Anderson and Minnich were seen fleeing from the area on bicycles. Minnich's bike had an attached trailer. While fleeing, Minnich's bike and trailer tipped over, and an officer apprehended him. Another officer separately apprehended Anderson after a brief pursuit.

Officers checked the store and found damage to its front door. Tools, including a blow torch and pry bar, were located at the scene.¹¹

III. Evidence Links Anderson and Minnich to the Church Incident.

At trial, the prosecution established that Minnich and Anderson were involved in the incident at the church.

When he was arrested after fleeing from the computer repair store, officers located a Hannibal Lecter mask inside a backpack in Minnich's bike trailer. This mask was

¹⁰ At trial, the pastor admitted that his blow to the suspect's head had caused his putter to bend. After this incident, he had placed his bent putter into his vehicle. Because it was bent, however, he had decided not to keep it. At trial, the pastor did not know the location of the putter.

¹¹ A hole had been made in the glass off the front door, but it appeared that Anderson and Minnich were unable to enter the business.

similar to the Hannibal Lecter mask worn by a suspect during the church incident, and police concluded that suspect was Minnich. Minnich had a distinctive bald patch on the back of his head. The church's security video showed the same bald patch on the suspect wearing the Hannibal Lecter mask.

After he was arrested, a detective noticed that Anderson had a wound on the back of his head. Police obtained deoxyribonucleic acid (DNA) samples from Anderson and Minnich. The Spiderman mask recovered from the church incident had blood inside it, which was tested. DNA testing established Anderson had worn this mask during the church incident.¹²

Authorities recorded certain telephone calls which Anderson and Minnich separately had while in jail. These recordings were played for the jury. In one call, a female asked Minnich why he was "hitting churches?" He answered, "Because they were easy" and he noted that many churches did not have alarms. In another call, Minnich lamented that authorities had "some fingerprints" from "the stun gun which was gotten rid of." However, he stated three other people had touched the stun gun.

In a recorded jail call, Anderson indicated that he wanted to change the direction of his life. He told an unidentified male he wanted to go to the church and "thank that guy." Anderson stated he was "too old." He noted he had "almost" had his "head caved in[.]"

DISCUSSION

I. *Substantial Evidence Supports Minnich's Robbery Conviction*

Minnich asserts insufficient evidence supports his robbery conviction in count II. He seeks its reversal.

¹² The third suspect involved in the church incident (the one who sprayed the chemical substance on the pastor's face) did not participate in this trial and he was not identified.

A. Standard of Review

When considering a challenge to the sufficiency of the evidence to support a conviction, we review the record in the light most favorable to the judgment and decide whether it contains substantial evidence from which a reasonable finder of fact could make the necessary finding beyond a reasonable doubt. The evidence must be reasonable, credible and of solid value. We presume every inference in support of the judgment that the finder of fact could reasonably have made. We do not reweigh the evidence or reevaluate witness credibility. We cannot reverse the judgment merely because the evidence could be reconciled with a contrary finding. (*People v. D'Arcy* (2010) 48 Cal.4th 257, 293.)

B. Analysis

We summarize the applicable law regarding robbery. We also review *People v. Hodges* (2013) 213 Cal.App.4th 531 (*Hodges*), which Minnich cites.

1. An overview of robbery

Robbery is a species of aggravated larceny. (*People v. Gomez* (2008) 43 Cal.4th 249, 254.) Theft by larceny may be committed without the victim being present, and it does not involve force or the threat of violence. (*Ibid.*) “Larceny requires the taking of another’s property, with the intent to steal and carry it away.” (*Id. at pp. 254-255.*) In contrast, a robbery requires the taking to be accomplished by force or fear, and the property must be taken from the victim or in the victim’s presence. (*Id. at p. 254*; see also § 211.) Both larceny and robbery are continuing offenses. (*People v. Gomez, supra*, at p. 254.)

There are two aspects of the “taking” required for larceny or robbery. First, the suspect must achieve possession of the property, which is called “caption.” (*People v. Gomez, supra*, 43 Cal.4th at p. 255.) Second, the suspect must carry the property away, which is called “asportation.” (*Ibid.*) A theft continues until the perpetrator has

reached a place of temporary safety with the property, and the slightest movement may constitute asportation. (*Ibid.*)

If force or fear is used to carry the stolen property away, a robbery can occur even if the property was peacefully or duplicitously acquired. (*People v. Gomez, supra*, 43 Cal.4th at p. 256.) In other words, theft becomes robbery if a suspect uses force or fear to carry away the loot. (*People v. Cooper* (1991) 53 Cal.3d 1158, 1165, fn. 8.) However, it is not necessary for a robber to escape with the stolen items to commit robbery. (*People v. Pham* (1993) 15 Cal.App.4th 61, 65.)

2. People v. Hodges

In *Hodges*, an opinion upon which Minnich relies, the defendant was found guilty of robbery, in addition to other charges. (*Hodges, supra*, 213 Cal.App.4th at p. 533.) A loss prevention officer saw the defendant take items from a store without paying. The officer confronted the defendant while the defendant was sitting in his vehicle. (*Id.* at p. 535.) The defendant offered to give the items back, but the officer refused. (*Id.* at pp. 535-536.) A second loss prevention officer arrived, and the defendant pushed or shoved the stolen items at this second officer, hitting his chest. (*Id.* at p. 536.) The defendant drove away, causing the second officer to fall to the ground. (*Ibid.*)

During the trial in *Hodges*, the defense requested the following pinpoint instruction: “‘If [the defendant] truly abandoned the victim’s property before using force, then, of course, he could be guilty of theft, but not of ... robbery.’” (*Hodges, supra*, 213 Cal.App.4th at p. 537.) The court denied giving this instruction. (*Ibid.*) During deliberations, the jurors asked a question which demonstrated they sought guidance regarding whether or not the defendant could be convicted of robbery if they determined he had surrendered the stolen goods prior to the use of force. (*Id.* at p. 541.) In response, the court informed the jury that a theft is deemed to be continuing until the defendant has reached a point in which he is no longer being confronted. (*Id.* at p. 542.)

On appeal, the *Hodges* court determined the trial court's response was misleading. (*Hodges, supra*, 213 Cal.App.4th at p. 543.) The jury's question had not pertained to the duration of the theft, but, rather, whether the timing of the defendant's surrender of the property was relevant to the element of force or fear in establishing robbery. (*Ibid.*) Based on the court's response, the jury could have concluded the defendant was guilty of robbery without regard to whether the defendant intended to permanently deprive the owner of the property at the time the force or resistance occurred. (*Ibid.*) The appellate court reversed the robbery conviction.¹³ (*Id.* at p. 544.)

Minnich asserts he abandoned the stolen property prior to the use of force and, based on *Hodges*, he claims he cannot be liable for robbery. He further contends the pastor assaulted Anderson with a deadly weapon and without provocation. He argues the suspects only used reasonable force to assist Anderson and not with an intent to carrying away the stolen items. We reject these arguments.

3. *Despite an evidentiary dispute, sufficient evidence supports the jury's verdicts*

An evidentiary dispute existed at trial regarding when the pastor struck Anderson with the putter. According to the pastor, he struck Anderson with the putter *after* Anderson told the others to attack him. The pastor testified he did so because he feared for his safety. At trial, the pastor was 100 percent certain Anderson made his statement before the pastor struck him. In contrast to the pastor's testimony, a detective provided a

¹³ In a footnote, the *Hodges* court submitted the following hypothetical: "A person leaves a store without paying for goods, drops the goods when confronted by a security guard, and flees; the guard gives chase and at some point during the pursuit, the person uses force to resist the pursuing guard's attempt to detain him. Under this hypothetical, the escape rule, concerning the *duration* of the offense, is not in play because no robbery was *committed*, there being no evidence that the person intended to deprive the owner of the property at the time force was used." (*Hodges, supra*, 213 Cal.App.4th at p. 543, fn. 4.)

slightly different version of events. According to the detective's report, the pastor had reported striking Anderson *before* Anderson told the others to attack the pastor.

The jury acquitted Minnich of assault with a stun gun (§ 244.5, subd. (b); count III).¹⁴ Despite that acquittal, however, the jury found Minnich guilty of robbery (§ 211; count II). Based on that verdict, it is clear the jury believed Minnich used force or fear with the intent to carry away the stolen property. The record supports the jury's conclusion.

The evidence demonstrates Minnich threatened the pastor with harm, and he actively worked with the second suspect in an effort to injure the pastor. The jury was free to credit the pastor's testimony that Anderson directed the others to attack the pastor *before* the pastor struck Anderson. After the pastor knocked Anderson down, the second suspect sprayed a chemical onto the pastor's face. Minnich approached with the stun gun, which the pastor was able to knock from Minnich's hand with the putter. The pastor testified that, after these exchanges, he stood his ground and he told the suspects to leave the stolen items.

Minnich contends an inference can be drawn from the evidence which shows he merely attempted to assist Anderson without an intent to use force or fear to carry away the stolen property. However, the jurors were convinced beyond a reasonable doubt that the prosecution had established Minnich's guilt. The jurors were tasked with resolving witness credibility and with determining the truth or falsity of the facts. (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 162; see also § 1127.) We will not reweigh the evidence

¹⁴ During closing argument, Minnich had questioned the pastor's credibility. Minnich had noted that the pastor had provided different version of events over time. Minnich had asserted the pastor must have struck Anderson from behind while the pastor was chasing the fleeing suspects. Minnich contended he had not used force or fear to take the stolen property. Instead, he had argued he had only acted to help Anderson. He contended he could not be guilty of assault with the stun gun based on the doctrine of defense of another.

or reevaluate witness credibility. (*People v. D'Arcy, supra*, 48 Cal.4th at p. 293.)

Likewise, we cannot reverse the judgment merely because the evidence could be reconciled with findings contrary to the jury's verdict. (*Ibid.*) To the contrary, the jury could have reasonably determined Minnich held an intent to use force or fear to carry away the stolen items.¹⁵

Unlike in *Hodges*, nothing indicates the jury was confused regarding the applicable legal standards. With CALCRIM No. 1600, the jury was instructed that Minnich was guilty of robbery if he used force or fear to take the property and, when he did so, he intended to deprive the owner of the property permanently.¹⁶ Contrary to *Hodges*, substantial evidence establishes that Minnich used fear or force in an effort to escape with the stolen property. *Hodges* is distinguishable, and it does not dictate reversal of Minnich's conviction for robbery.

Based on this record, substantial evidence exists from which a reasonable jury could have found Minnich guilty of robbery beyond a reasonable doubt. This evidence was reasonable, credible and of solid value. (See *People v. D'Arcy, supra*, 48 Cal.4th at p. 293.) Therefore, Minnich's arguments are without merit and this claim fails.

¹⁵ Likewise, we disagree with Minnich's argument that he was only motivated to escape and not to retain possession of the stolen items. A reasonable inference exists that Minnich used force or fear in an effort to carry away the stolen items. In any event, the evidence suggests the suspects did not abandon all of the loot. Although the suspects left behind most of the items taken from the church, an external hard drive and an iPod were never recovered. The pastor told the jury that one or two other items, such as a thumb drive, could also still be missing, but he was not sure without reviewing the insurance report.

¹⁶ The jury was instructed that "[a] church official possesses church property if he or she has control or the right to control the property." This was a correct statement of law because "persons responsible for protecting and preserving property are properly deemed to be robbery victims." (*People v. Weddles* (2010) 184 Cal.App.4th 1365, 1370.)

II. We Remand for Resentencing in Light of Senate Bill 1393

In September 2018, the Governor signed Senate Bill 1393. This law became effective on January 1, 2019. Under Senate Bill 1393, sentencing courts now have discretion to dismiss or strike a five-year enhancement for a prior serious felony conviction. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 965.)

Sentencing in this matter occurred in 2018 before Senate Bill 1393 was signed. The trial court imposed a five-year enhancement (§ 667, subd. (a)) against Minnich based on his prior serious felony conviction. At the time of Minnich's sentencing, the imposition of this five-year enhancement was mandatory. In light of this change in law, the parties agree, as do we, it is appropriate to remand this matter for resentencing. Upon remand, the court shall exercise its discretion whether to dismiss or strike the five-year enhancement imposed against Minnich pursuant to section 667, subdivision (a). We express no opinion how the court should exercise its discretion.

DISPOSITION

The sentence is vacated and this matter is remanded for resentencing. The trial court shall exercise its discretion to dismiss or strike the five-year enhancement imposed under section 667, subdivision (a). Following resentencing, the court shall forward an amended abstract of judgment to the appropriate authorities. In all other respects, the judgment is affirmed.

SMITH, J.

WE CONCUR:

HILL, P.J.

MEEHAN, J.